**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MARIA G. MORALES** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,046,556 |
| **WAL-MART** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **INS. CO. OF THE STATE OF PENNSYLVANIA** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requested review of the September 8, 2011 Award by Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on December 13, 2011.

### APPEARANCES

Conn Felix Sanchez, of Kansas City, Kansas, appeared for the claimant. Michael R. Kauphusman, of Overland Park, Kansas, appeared for respondent and its insurance carrier. As of October 31, 2011, Board Member Julie Sample has been replaced on the Board by Mr. Gary R. Terrill. However, due to a conflict, Board Member Terrill, has recused himself from this appeal. Accordingly, Mr. E.L. Lee Kinch, of Wichita, Kansas has been appointed as a Board Member Pro Tem in this case.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At the oral argument to the Board, the parties stipulated that the issues dealing with temporary partial disability compensation and temporary total disability compensation are no longer issues before the Board on this appeal. The rulings by the SALJ on those issues are, therefore, affirmed.

## ISSUES

The SALJ found that the claimant suffered an accidental injury on June 2, 2009, arising out of and in the course of her employment with respondent. Claimant continued to work for respondent until her termination, one year later. The SALJ found that it is more likely than not that claimant's injuries resulted in her disability. The SALJ then found claimant to be physically able to work and therefore, not permanently and totally disabled. Claimant was awarded a 7.5 percent whole person permanent partial functional impairment, followed by an 88 percent permanent partial general (work) disability. Respondent was found to be entitled to an offset of claimant's social security retirement benefits at the rate of $69.00 per week, in the total amount of $23,050.83.

Claimant argues that she is permanently and totally disabled based on the opinion of Dr. Murati and therefore, the Board should modify the Award accordingly. Claimant also argues that she is not subject to the provisions of the social security offset under K.S.A. 44-501(h), because she began receiving social security retirement benefits prior to the work-related accident. In the alternative, claimant requests that the Award be affirmed.

Respondent argues that the Board should affirm the credit for the social security retirement benefits, but limit claimant's award to a 5 percent permanent partial impairment of function to the body as a whole, with no additional award for a work disability.

## ISSUES

Claimant raises the following issues on appeal:

1. Did the SALJ fail to properly apply K.S.A. 44-501(h), in allowing respondent an offset for claimant's social security benefits?
2. Is K.S.A. 44-501(h) unconstitutional as it denies the claimant, an older worker, equal protection under the law?
3. Did the SALJ err in finding that the claimant was not permanently and totally disabled?
4. What is the nature and extent of claimant's functional impairment and work disability?

## FINDINGS OF FACT

Claimant, who was 64 years old at the time of the regular hearing, began working for respondent in 2008 as a stocker. She suffered an injury to her back as a result of a June 2, 2009 accident when she fell off a stool while stocking shelves, landing on her back and hitting her left knee on a shelf. Claimant worked for respondent as a stocker until her accident. After the accident, claimant was returned to work as a cashier until her

involuntary termination in June 2010, as the result of a customer complaint. Claimant was not told the nature of the complaint. She has not worked since June 2010.

Claimant was working 32 hours a week as a stocker before the accident. But only 16 hours a week as a cashier after the accident. She testified that she was working less because of her restrictions of no repetitive bending, twisting, or lifting, alternate sitting and standing for pain control and no lifting over 15 pounds. She testified that she signed up for FMLA after her accident because she was told she had to in order to keep her job. She cited personal health condition, as her reason for the FMLA request and not a workers compensation accident.

Claimant began receiving social security retirement benefits in November 2008 ($299 a month), which was prior to the date of accident in this matter. She was not receiving those benefits when she started working for respondent. Claimant is also receiving social security disability benefits in the amount of $169 a month.

Claimant testified that she has not been able to find work because of her restrictions on lifting and carrying. Currently, claimant has pain in her back and right hand. She has a separate claim for a right hand injury which is not connected to this back claim. Claimant's back pain extends down her right leg into her knee. She can't walk or sit for long and has trouble sleeping for more than 15 to 20 minutes. She can't stand for longer than 45 minutes. It was recommended that claimant undergo surgery on her back, but her heart doctor doesn't recommend it because he didn't want her to be off her medicine (a blood thinner - Coumadin or Warfarin) for as long as the surgeon wanted (2 weeks). This is the sole reason claimant did not have the back surgery.[1]

Claimant testified that she has developed a lot of basic job skills over the years. She used to work as a CNA and an over-the-road truck driver, and worked as a Spanish interpreter in western Kansas for many years. She believes that she could work as a Spanish Interpreter in her local area (Kansas City/Metropolitan) if she became certified for that area. She testified that she would first need enough money to cover the cost of starting her own interpreting business.

Claimant met with Dr. Pedro Murati at the request of her attorney, for an examination on August 11, 2009. Claimant's chief complaints included pain in her lower back and left leg and a reported inability to stand for long periods of time.

Dr. Murati examined the claimant and diagnosed bilateral SI joint dysfunction, left patellofemoral syndrome and low back pain with signs and symptoms of radiculopathy. He opined that claimant's diagnoses was, within reasonable medical probability, a direct result of claimant's work-related injury during her employment with respondent.

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[1] R.H. Trans. at 12-13.

Dr. Murati made the following recommendations: for the bilateral SI joint dysfunction -- cortisone injections to decrease inflammation, physical therapy to include instruction in the use of an SI belt and/or gait training and anti-inflammatory and pain medication; for left patellofemoral syndrome, cortisone injections and Synvisc injections; if no improvement, knee braces that pull the patella medially or McConnell taping and anti-inflammatory and pain medication as needed; for the low back, a bilateral lower extremity NCS/EMG to include the lumbar paraspinals to evaluate and/or document any radiculopathy, physical therapy, anti-inflammatory and pain medication as needed, and a series of lumbar epidural steroid injections. If claimant shows no improvement with conservative treatment, then a surgical evaluation would be recommended.[2]

Dr. Murati assigned the following temporary restrictions based on a 4 hour workday: occasionally sit, stand, or walk, rarely bend, crouch or stoop, no climbing stairs or ladders, no squatting, crawling, driving (manual), kneeling, no repetitive foot controls with the right, no lifting, carrying pushing or pulling more than 10 pounds, occasionally 10 pounds and frequently 5 pounds, and no lifting below knuckle height.[3]

Claimant met with Dr. Adrian Jackson, a board certified orthopedic spine surgeon, on February 17, 2010 for an evaluation, both at the request of the insurance carrier and as a referral by Dr. Joseph Galate. Claimant presented with complaints of low back pain and right leg pain. Claimant told Dr. Jackson that she injured her low back when she fell off of a wheeled stool as she was trying to stock shelves. Dr. Jackson was aware that the claimant sought medical treatment after the accident, was sent for physical therapy and had 3 epidural injections. Claimant reported that the physical therapy did not help. The injections did help, but not substantially. Claimant described several falls at work over the years. But she had not sought medical treatment or suffered any significant injuries as a result of those earlier falls.

Dr. Jackson examined claimant and diagnosed low back pain and right leg pain, a large disc herniation at L3-4 with central and bilateral stenosis, multilevel spondylosis and stenosis.

Dr. Jackson found that the claimant's injury on June 2, 2009 was a prevailing factor in her current clinical condition, and that the large disc herniation at L3-4 is likely responsible for her radicular complaints. He testified that either claimant aggravated the disk when she fell or the fall actually caused the herniation.

Dr. Jackson offered two treatment options, the first was to continue with conservative treatment. The second involved a surgical intervention, including a minimally

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[2] Murati Depo., Ex. 2 at 3 (Dr. Murati's Aug. 11, 2009 IME report).

[3] Murati Depo., Ex. 2 at 4 (Release to Return to work dated Aug. 11, 2009).

invasive right L3-4 decompression and discectomy. Dr. Jackson explained to claimant that this surgery would not eliminate all of her symptoms, but would likely improve her radicular complaints. Claimant chose the surgical intervention. Dr. Jackson opined that the claimant would be off work for 6 weeks and then would be under work restrictions for another 6 weeks.

The arrangements for surgery were made, however, Dr. Jackson was later notified that the claimant decided against surgery. He testified that he never received an official explanation as to why the claimant changed her mind. There is an indication in his records that claimant's cardiologist did not want her to stop taking her blood thinner for the recommended amount of time. Dr. Jackson was not provided a letter from claimant's cardiologist stating that she could be off of her blood thinning medication for 7 days prior to her back injection. He acknowledged that it would not be a good idea for someone having surgery to be on a blood thinner. If a patient could not be off a blood thinner then surgery would not be a viable treatment option. He testified that there were other options which would allow claimant to have the surgery. But the record indicates that claimant's cardiologist rejected any proposal that had her off the blood thinner medication for more than 7 days.

Dr. Jackson has not seen the claimant since February 17, 2010. In a letter dated April 12, 2010, he found the claimant to be at maximum medical improvement and assigned claimant a 5 percent permanent partial impairment of the whole body, for her low back, based on the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).[4] He did not assign any work restrictions. He felt that claimant was capable of working and should simply self-restrict her activities so she would not further injure her back. Dr. Jackson admitted that he had no idea what claimant's physical condition was on April 12, 2010, but opined that it would not have changed between February and April, if it hadn't changed since the time of the original injury.[5]

Claimant again met with Dr. Murati on August 10, 2010. Claimant reported continued pain in her lower back and trouble sitting and standing for long periods of time. Dr. Murati noted that the claimant had met with Dr. Galate on a few occasions for epidural injections and on the last visit, surgery was recommended. Claimant was sent to Dr. Jackson for a surgical evaluation. Claimant opted for surgery, but her primary care physician recommended that she not be off of the Coumadin that had been prescribed for her heart condition.

Dr. Murati diagnosed bilateral SI joint dysfunction, and low back pain with signs and symptoms of radiculopathy. He again opined that claimant's diagnoses was, within

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[4] Jackson Depo., Ex. 3 (Dr. Jackson's Apr. 12, 2010 letter).

[5] Jackson Depo. at 15.

reasonable medical probability, a direct result of claimant's work-related injury during her employment with respondent.

Dr. Murati assigned a 10 percent whole person impairment under lumbosacral DRE III of the 4th edition of the AMA *Guides*. He assigned permanent restrictions based on an 8 hour workday of occasionally sit, stand, or walk, rarely bend, crouch or stoop, rarely climb stairs, no climbing ladders, no squatting, crawling, driving, no constant lifting, carrying pushing or pulling more than 10 pounds, occasionally 10 pounds and frequently 5 pounds, alternate sitting standing and walking. Claimant was to rest for 30 minutes for every hour worked. Dr. Murati opined that with these restrictions claimant is essentially and realistically unemployable.[6]

Dr. Murati had the opportunity to review the task list of Dick Santner and opined that, out of 23 tasks, claimant could no longer perform, in a safe manner, 20 tasks for an 87 percent task loss.[7] The SALJ found that claimant had a 76 percent task loss, based upon the opinion of Dr. Murati. But, he failed to explain in the award how he reached that task loss percentage.

At the request of her attorney, claimant met with vocational expert Dick Santner for a vocational assessment. Mr. Santner opined that claimant would be able to work as an interpreter, part-time, based on the availability of jobs in that line of work in the Kansas City area as opposed to western Kansas. Claimant had worked as an interpreter for many years in western Kansas before moving to the Kansas City area. Mr. Santner testified that if the claimant wanted to pursue this employment field, she would have to do it on her own as an independent contractor and would have to obtain additional training to be able to compete in the Kansas City labor market.

At respondent's request, claimant met with vocational expert Terry Cordray for a vocational assessment on November 23, 2010. Mr. Cordray obtained an extensive work history from claimant, documenting the various work tasks claimant had performed over the preceding fifteen years. Mr. Cordray opined that claimant was not totally disabled and had the ability to work as a cashier, a bilingual bank teller, a customer service representative, and, within some restrictions, she could do light retail sales work, sell cosmetics, and clothing. It was significant that claimant continued to work for respondent for a year after the accident.

The SALJ determined that claimant suffered a 7.5 percent whole person functional impairment, after averaging the opinions of Dr. Jackson and Dr. Murati, followed by an 88

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[6] Murati Depo., Ex. 3 at 4 (Release to Return to work dated Aug. 10, 2010).

[7] Murati Depo., Ex. 4 (Task List).

percent whole person permanent partial (work) disability, based upon a task loss of 76 percent and a wage loss of 100 percent.

## PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[10]

K.S.A. 2008 Supp. 44-501(h) states:

> (h) If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

The Board will first consider the issues associated with the social security retirement offset. Claimant contends that the offset is unconstitutional as it denies claimant, an older worker, equal protection under the Bill of Rights of the Kansas Constitution. That issue was addressed by the Kansas Supreme Court in *Injured Workers of Kansas v. Franklin.*[11] The *Franklin* Court, holding the statute to be constitutional, stated that the "social security offset in K.S.A. {1998 Supp.} 44-501(h) is rationally related to the valid state interest of

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[8] K.S.A. 44-501 and K.S.A. 44-508(g).

[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[10] K.S.A. 44-501(a).

[11] *Injured Workers of Kansas v Franklin*, 262 Kan. 840, 942 P.2d 591 (1997)

preventing the duplication of wage loss replacement benefits."[12] The Board defers to the Kansas Supreme Court on questions concerning the constitutionality of statutes.

Claimant also contends that the offset should not apply because she was already receiving the social security benefits at the time of the accident. The Kansas Supreme Court was asked to address this issue in *Dickens*.[13] In *Dickens*, the claimant retired at the age of 64. After retirement, he took a job with Pizza Hut to supplement his social security income. The claimant in *Dickens* worked for Pizza Hut for 8 years before his injury in an auto collision. The ALJ, in *Dickens*, rejected Pizza Hut's request for the offset, reasoning that the offset was intended to prevent the duplication of benefits. The ALJ relied on *Boyd*[14]in reaching that conclusion. The *Boyd* Court was asked to analyze the since repealed K.S.A. 1976 Supp. 44-510f(c), which provided:

> "An employee shall not be entitled to compensation benefits for permanent total disability, temporary total disability or partial disability, under the workmen's compensation act, from and after the date when he shall be entitled to and during such period as he shall receive federal old age social security benefits, reduced or unreduced."

The *Boyd* Court held that K.S.A. 1976 Supp. 44-510f(c) did not apply to a worker who had already retired, but was working to supplement his social security income.[15] The Court in *Dickens*, citing *Boyd*, found that a retired person who works to supplement social security income, suffers a second wage loss when injured in the course of that supplemental employment.[16] As the Court in Dickens noted, there is no wage-loss duplication in the scenario of a worker injured after receiving social security benefits. The Dickens Court analysis finding that no offset is appropriate when an already retired worker receiving social security old age benefits suffers a second wage loss, applies to this situation. Here claimant was receiving social security retirement benefits prior to suffering the injury on June 2, 2009. The social security offset allowed by the SALJ pursuant to K.S.A. 44-501(h) is reversed.

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American

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[12] *Id.* at 870.

[13] *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

[14] *Boyd v Barton Transfer & Storage*, 2 Kan. App. 2d 425, 580 P.2d 1366, rev. denied 225 Kan. 843 (1978)

[15] *Id.* at 429.

[16] Dickens at 1069.

> Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[17]

Dr. Jackson opined that claimant suffered a 5 percent whole person functional impairment as the result of her injuries with respondent. Dr. Murati found claimant's functional loss to be 10 percent to the whole person. Both functional impairments were determined utilizing the AMA Guides, 4th ed. The SALJ found that neither opinion was more persuasive than the other and averaged the two, finding claimant suffered a 7.5 percent whole person functional impairment. The Board agrees and affirms that finding.

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[18]

Claimant next contends that she is permanently and totally disabled from any employment. However, claimant continued to work for respondent for a full year after her accident. Additionally, Dr. Jackson found claimant capable of performing her former job. Vocational expert Terry Cordray also found claimant capable of performing work in the open labor market. Even vocational expert Dick Santner, claimant's expert opined that claimant was capable of working as an interpreter in the Kansas City area, although he acknowledged that she would have to work as an independent contractor. Claimant also testified that she retained the capability to work as an interpreter, having done so for many years. The Board finds that claimant retains the ability to engage in substantial and gainful employment in the open labor market and is not permanently and totally disabled. The ruling of the SALJ on that issue is affirmed.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[19]

The SALJ found claimant to have a 100 percent wage loss, citing *Bergstrom*[20] in support of the elimination of a "good faith" job search rule. The Board agrees that the good

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[17] K.S.A. 44-510e(a).

[18] K.S.A. 44-510c(a)(2).

[19] K.S.A. 44-510e.

[20] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009); See also, *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 224 P.3d 1197, (2010)

faith test no longer applies to work disability in Kansas. Claimant is not working and has suffered a 100 percent wage loss under K.S.A. 44-510e.

The SALJ further found that claimant has a 76 percent task loss, citing the opinion of Dr. Murati and the task list of Dick Santner. However, Dr. Murati found claimant incapable of performing 20 of 23 past tasks, an 87 percent task loss. There is no explanation for this mathematical discrepancy. The Board likewise finds the task loss opinion of Dr. Murati to be persuasive, but modifies the loss percentage as noted above. Claimant has suffered an 87 percent task loss, which, when averaged with the 100 percent wage loss results in a work disability of 93.5 percent. Respondent contends that Dr. Jackson returned claimant to work with no restrictions and thus, no task loss. However, Dr. Jackson did not say no restrictions. He merely advised claimant to self-restrict her activities to avoid further injury. In fact, at one point, Dr. Jackson recommended surgery for claimant. The Board finds the task loss opinion of Dr. Murati to be the most persuasive in this record.

## CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the SALJ should be modified to deny an offset by respondent for claimant's social security benefit. Additionally, claimant's task loss will also be modified to 87 percent per the opinion of Dr. Murati. This results in a work disability award of 93.5 percent. In all other regards, the award of the SALJ shall be affirmed in so far as it does not contradict the findings and conclusions contained herein.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated September 9, 2011, is modified to deny respondent an offset of claimant's social security retirement benefits pursuant to K.S.A. 44-501(h) and modified to find that claimant has suffered an 87 percent task loss pursuant to K.S.A. 44-510e. This results in a permanent partial general (work) disability of 93.5 percent. In all other regards the award is affirmed in so far as it does not contradict the findings and conclusions contained herein.

Claimant is entitled to 4 weeks of temporary total disability compensation at the rate of $141.47, totaling $565.88, followed by 31.13 weeks of permanent partial disability compensation at the rate of $141.47 totaling $4,403.96, for a 7.5 percent permanent partial whole person functional impairment. Effective June 26, 2010, claimant is entitled to 358.92 weeks of permanent partial whole person general disability at the rate of $141.47 totaling $50,776.19, for a total award of $55,746.03.

As of January 6, 2012, there would be due and owing claimant 4 weeks of temporary total disability compensation at the rate of $141.47, or $565.88, followed by 31.13 weeks permanent partial disability compensation at the rate of $141.47, totaling $4,403.96, followed by 135.29 weeks permanent partial disability compensation at the rate of $141.47, for a total due and owing of $24,109.32. Thereafter claimant shall be paid for 192.33 weeks at the rate of $141.47, until fully paid or until further order of the Director.

**IT IS SO ORDERED.**

Dated this _____ day of January, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Marcia Yates Roberts, Administrative Law Judge